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IN THE

Supreme Court of the United States

October Term, 1956. No. 264

W. HERBERT HOOVER,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

W. HERBERT HOOVER, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on May 29, 1956.

OPINIONS BELOW.

The opinion of the district court denying petitioner's motion for a new trial (R. 373a-378a) is reported at 139 F. Supp. 895. The opinion of the court below (Appendix A, *infra*, pp. 27-35) has not yet been reported.

JURISDICTION.

The judgment of the court below (Appendix B, *infra*, pp. 36, 37) was entered on May 29, 1956. On June 7, 1956, Mr. Justice Burton entered an order extending the time for filing a petition for a writ of certiorari to and including July 28, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

QUESTIONS PRESENTED.

1. Whether a taxpayer against whom prosecution has commenced by the filing of a complaint charging him with filing a false income tax return with the Collector of Internal Revenue in the Eastern District of Pennsylvania, where it was required to be filed, in violation of §145(b) of the Internal Revenue Code of 1939 may thereafter be indicted and prosecuted in the Western District of Pennsylvania, following a second complaint, for signing and tendering the same return to a subordinate of the Collector in the Western District.

2. Whether an indictment that simply alleges that a taxpayer signed and tendered an income tax return in the Western District of Pennsylvania that was required by law to be filed in the Eastern District of Pennsylvania alleges an offense under §145(b) of the Internal Revenue Code of 1939.

3. Whether, where an internal revenue agent testified to statements made by a defendant in the course of three lengthy interviews, it was proper for the trial judge to cut off cross-examination designed to elicit other statements

made by the defendant in the course of those three interviews.

4. Whether it was proper to refuse a requested instruction based on the proposition that the misdemeanor denounced by §3616(a) of the Internal Revenue Code of 1939 is a lesser included offense within the felony proscribed by §145(b) of the same compilation.

STATUTES AND RULES OF COURT INVOLVED.

1. The Internal Revenue Code of 1939 provided:

"**§145. Penalties.**

* * * * * * * * *

"(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

2. **Sec. 3616. Penalties.**

"Whenever any person—

"(a) *False Returns.*—Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the

valuation, enumeration, or assessment intended to be made; * * *

* * * * * * * * *

he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

* * * * * * * * *

3. United States Code, Title 18, Section 3732, provides:

"§3732. Offenses begun in one district and completed in another.

"Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

"Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves."

4. Federal Rules of Criminal Procedure provides:

"Rule 21. Transfer from the District or Division for Trial.

* * * * * * * * *

"(b) Offense Committed in Two or More Districts or Divisions.

"The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information

or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

Rule 31. Verdict.

* * * * * * * * *

"(c) *Conviction of Less Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

STATEMENT.

A. *Indictment and Venue.* Petitioner was indicted for violation of §145(b) of the Internal Revenue Code of 1939 in a three count indictment (R. 3a-5a) alleging that he "did willfully and knowingly attempt to evade and defeat" his income tax for the years 1948, 1949, and 1950, "by signing and tendering to an Internal Revenue Service official at Altoona, Pennsylvania" a false and fraudulent tax return, "which return was filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Pennsylvania." There was no allegation that petitioner himself filed or caused the return to be filed with the Collector.

The first complaint in this case charged petitioner with unlawfully and willfully attempting to evade and defeat income taxes, etc., by filing and causing to be filed with the Collector of Internal Revenue at Philadelphia a false and fraudulent return for the year 1948 (R. 294a-296a). Counsel for petitioner resides in Philadelphia. The United States Attorney withdrew this complaint (R. 296a) and requested that another be signed (R. 297a).

The second complaint charged the same offense by tendering such a return to an Internal Revenue official at Altoona (R. 296a-297a). This second complaint, unlike the indictment herein (R. 3a-5a), did not allege any signing of the return.

The question of improper venue was the subject of a long colloquy in the course of the trial (R. 113a-122a), was one of the bases for petitioner's motion for acquittal at the close of the prosecution's case (R. 310a-330a), and was dealt with on the merits in connection with petitioner's renewed motion for acquittal after the trial (R. 2a, 373a-374a). Petitioner's objections going to improper venue were overruled (R. 330a, 374a).

B. *Petitioner's business.* Petitioner lived in Woodbury, Pennsylvania, population 258 (R. 227a). He conducted there an unincorporated milling business (R. 167a, 170a, 179a, 196a-201a; Ct. 273a) that he had acquired from his father in 1924 (R. 299a). He was stockholder (R. 145a) and director (R. 149a, 159a) of a bank having a capital of only $25,000 (R. 160a, 161a); employed in his office only one secretary who had no accounting qualifications (R. 184a, 187a, 189a, 192a, 228a, 241a); and did not employ any accountant prior to 1952 (R. 192a, 213a-214a). He worked up to 15 and 16 hours a day (R. 185a) without any vacation in many, many years (R. 275a), and lived frugally, drawing only $35 a week from the business (R. 226a, 243a, 274a-275a, 298a). He rented houses to employees at extremely low figures (R. 226a-227a, 233a), and endorsed accommodation notes for needy customers (R. 155a, 160a, 161a, 169a). He had outside income from various kinds of investments (R. 31a-102a, 124a-146a). His reputation in his community was of the highest (R. 298a, 331a-333a).

C. *Amended Returns.* Petitioner believed, relying *inter alia* on Treasury forms (R. 215a), that dividends of under $100 were not taxable (R. 213a, 214a, 217a, 218a, 234a, 269a,

281a-283a). When he first received a notice advising him that under changed Treasury regulations all dividends were taxable, regardless of amount (R. 212a-213a, 217a), he immediately consulted and retained one Rice, a C. P. A. (R. 212a-213a). Petitioner's returns were not under investigation at the time (R. 213a, 219a).

Thereafter, petitioner executed and filed amended returns for 1948, 1949, and 1950 (R. 15a, 207a-209a), and remitted $20,000 to the Director of Internal Revenue to cover taxes due (R. 22a, 24a, 224a-225a). The Director deposited the checks (R. 24a). Petitioner's first payment of $10,000, made on March 25, 1954 (R. 22a), was never acknowledged, while his September 15, 1954 payment of the second $10,000 (R. 22a, 24a) was not acknowledged until March 15, 1955 (R. 28a).

The $20,000 was sent to pay a tax liability for the years in question, that totaled, according to petitioner's accountant, only $9,107.58 (R. 229a), and which according to the Government was $10,685.44 on a joint return basis (R. 307a-309a).

The last payment was made in September, 1954 (R. 22a), the last amended return was filed late in October, 1954 (R. 15a). The first, or Philadelphia complaint, was not sworn to until January 5, 1955 (R. 294a), and the indictment was returned on March 9, 1955 (R. 1a). Neither Yaskin, the agent who swore to both complaints, nor Johnson, who first investigated petitioner's tax returns (R. 249a), had any knowledge until the present trial that petitioner had filed amended returns or had made additional remittances in respect of his tax liability (R. 263a, 276a, 297a).

D. *Petitioner's knowledge.* Petitioner's knowledge of the taxability of specific items of income is set out in greater detail immediately below. The following additional evidence of record bears on his state of mind.

In one year, when petitioner's business records reflected a loss of some $7,000, he returned a profit of about $2,000

on his return, because he believed that he should be making money (R. 222a-223a, 241a, 287a).

In each of the years now in question, petitioner filed individual returns (Govt. Ex. 1-3; R. 225a-226a), whereas, being married, he could have reduced his actual tax liability very considerably had he filed joint returns (R. 226a, 244a, 278a-279a).

Petitioner did not avail himself of permissible deductions in respect of business entertainment (R. 248a) or of a business loss (R. 303a), nor did he incorporate his business, an act that would have rendered 85% of his dividends not taxable (R. 273a).

Petitioner was surprised when advised of the actual profit derived from his business (R. 292a), and was also surprised when the extent of his net worth was pointed out to him (R. 221a, 294a).

Petitioner and his accountant cooperated fully with the agents, turning over everything (R. 220a, 224a, 232a, 264a), and petitioner did not claim his privilege when questioned by the Government's agents (R. 232a).

E. *Specific items.* Below are set out the items which the Government contended were taxable, and the state of petitioner's knowledge of taxability; the latter in each instance was testified to by prosecution witnesses.

1. Petitioner realized income in the form of gains on insurance policies (R. 74a-88a). He did not receive notices of such gains before 1954 (R. 89a-90a), and believed them to be not taxable (R. 222a, 231a).

2. Petitioner received fees from his bank for attendance at directors' meetings (R. 158a-159a). The bank did not send its directors any information forms evidencing such payments (R. 160a), and only began to do so in 1954 at petitioner's suggestion (R. 160a).

3. Petitioner took and endorsed notes (R. 151a-157a, 164a-178a). Interest thereon was paid to the bank and not to him (R. 160a-166a, 169a, 178a). His endorsements were accommodation for needy friends and customers (R. 161a, 163a, 186a). Other interest he believed to be non-taxable (R. 222a-287a).

4. The books of petitioner's milling business were kept by one secretary, of limited education, and without proficiency in accounting (R. 184a, 187a, 189a, 192a, 221a, 228a, 241a). During the years covering the returns now in question, petitioner employed no accountant (R. 192a, 213a-214a). The books did not clearly reflect the state of the business: in one year they showed a loss of $7,000 but petitioner returned a profit of $2,000 (R. 222a-223a, 241a, 287a), and ascertaining his true income therefrom was a considerable accounting task (R. 220a-225a, 232a-233a). Petitioner's original returns for the years in question reflected the best estimates of his business income that he was able to make (R. 223a, 242a, 286a, 299a-300a).

5. Petitioner received substantial sums in dividends (R. 49a-74a, 94a-102a, 124a-146a). He believed dividends of under $100 to be non-taxable (R. 213a, 214a, 217a, 218a, 234a, 269a, 281a-283a). Treasury Form 1099, the information return for 1950 read (R. 215a): "Dividend $100.00 or more total paid, including amounts claimed, non-taxable." As has been set forth above, p. 7, petitioner retained a C. P. A. upon receiving a notice to the contrary from one of his companies (R. 212a-213a, 217a). Petitioner did not realize that he had received any dividends of over $100 (R. 234a; cf. R. 282a). The Treasury agents located only nine dividend checks of more than $100 over a three-year period (R. 268a), although over the same period some twenty companies had sent him annual dividends in excess of more than $100 (R. 301a).

6. Petitioner also received annuity income (R. 74a-91a), interest on various kinds of investments (R. 91a-93a, 102a-104a, 111a, 148a-149a, 151a-152a), and capital gains (R 261a). He did not know that such items were taxable (R. 222a, 231a-232a, 282a, 287a), and he failed to deduct a capital loss (R. 303a).

F. *Curtailment of cross-examination at the trial.* Agent Yaskin testified to admissions made by the petitioner (R. 281a-288a) in the course of 460 questions and answers in three separate interviews (R. 280a, 289a). When petitioner's counsel on cross-examination sought to elicit the whole of these conversations, objection was made and sustained (R. 289a-291a)—and subsequently reaffirmed (R. 375a-377a)—on the view that the cross-examination was an attempt to impeach the witness, rather than, as stated by counsel (R. 290a), to adduce other parts of the three conversations.

G. *Refusal of Court to instruct.* Petitioner requested the following instruction (R. 371a-372a):

> "7. The crime charged in this indictment is a willful attempt to evade taxes. Therefore, the jury must find the defendant not guilty of the offense charged in the indictment, even if they believe that he delivered a false income tax return with the intent to defeat assessment of tax to the Collector."

This was explained as a request to enable the jury to find petitioner guilty of the lesser included misdemeanor under §3616(a), 1939 I. R. C., on which the statute of limitations had run (R. 337a-338a).

The request was denied (R. 338a).

H. *Verdict, Sentence, Motion for New Trial.* Petitioner was found guilty on all three counts (R. 365a), and was sentenced to confinement for a year and a day and to pay a

fine of $7,500 (R. 381a). A motion for a new trial was thereafter denied (R. 2a, 373a-378a). The district judge allowed bail pending appeal (R. 382a), saying (R. 381a), "Yes, I think there are substantial questions involved."

I. *Appellate action.* The court below affirmed (Appendix B, *infra* pp. 36, 37). It held Appendix A, *infra* pp. 27-35) that the indictment was sufficient, that the venue was proper, that the curtailment of petitioner's cross-examination of the internal revenue agent was not prejudicial, and that it was not error to refuse the requested charge, citing *Berra v. United States*, 351 U. S. 131.

REASONS FOR GRANTING THE WRIT.

This case presents as its principal question, the problem, not reached by the Court in *Parr v. United States*, 351 U. S. 513, of the proper venue for criminal prosecutions for tax evasion under Section 145(b) of the Internal Revenue Code of 1939 where the taxpayer lives in one judicial district and the internal revenue office where he is required to file his return is located in another. Inasmuch as there is a widespread divergence throughout the country between the boundaries of judicial districts and internal revenue collection districts, see Wolfram, *Tolling the Statute of Limitations in a Criminal Tax Case*, 28 Taxes 609, and inasmuch as there is much confusion in the precedents, compounded by an increasing tendency on the part of prosecutors to seek indictments, not on any consistent basis, but in what is deemed the most favorable forum for prosecution, sometimes where the alleged false return is prepared, sometimes where it is required by law to be filed, and sometimes—as here—in a district where it is tendered to an internal revenue official in a branch office for filing elsewhere, it is obvious that the question is one of continuing public importance.

First. The proof here shows that Agent Yaskin first filed a complaint charging petitioner with unlawfully and willfully attempting to evade and defeat income taxes, etc., for the year 1948 by filing and causing to be filed with the Collector of Internal Revenue at Philadelphia a false and fraudulent return (R. 294a-296a), and that he thereafter filed a complaint charging petitioner with the same offense by tendering such a return to an Internal Revenue official at Altoona (R. 296a-297a).[1]

The first complaint alleged an offense committed in the Eastern District of Pennsylvania, the second an offense committed in the Western District. Similarly, in *Parr*, the first indictment alleged the preparation of a false return at San Diego, Texas, and its deposit in the Corpus Christi branch Internal Revenue office, both being in the Southern District of Texas (R. 1-3, No. 320, Oct. T. 1955), while the second indictment charged the identical offense by filing and causing the allegedly false return to be filed with the Collector of Internal Revenue at Austin in the Western District of Texas (*id.*, R. 20-22).

Yet in the Washington-Baltimore situation, where every Washington taxpayer is required to file his return with the Director (formerly Collector) of Internal Revenue in Baltimore, inasmuch as the District of Columbia is included within the Maryland internal revenue collection district, it has been uniformly held that §145(b), as well as analogous and predecessor provisions, is violated by the filing of a false return in Baltimore, even though the return is mailed in Washington or even handed to a Deputy Collector in Washington; and, further, that no part of the offense is committed in the District of Columbia, thus precluding the application of Criminal Rule 21(b) (*supra*, p. 4). *United States v. Warring*, 121 F. Supp. 546 (D. Md.), affirmed 222 F. 2d 906 (C. A. 4), certiorari denied 350 U. S. 861; *United*

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[1] It will be observed that this record complaint did not allege signing, although the subsequent indictment did (R. 3a-5a).

States v. Yarborough, 16 F. R. D. 212 (D. Md.), affirmed 230 F. 2d 56 (C. A. 4). This rationale follows the cases involving the Baltimore-Washington problem that preceded the adoption of the Criminal Rules. *Bowles v. United States*, 73 F. 2d 772 (C. A. 4), certiorari denied 294 U. S. 710; *Wampler v. Snyder*, 66 F. 2d 195 (App. D. C.).

In accord with the *Warring* case is *United States v. Aaron*, 117 F. Supp. 952, 954 (N. D. W. Va.), holding that the place where the returns were executed and mailed is of no importance.

Contra to the Fourth Circuit is the holding of the Sixth in *United States v. United States District Court*, 209 F. 2d 575, to the effect that where it appears from the indictment and the bill of particulars that an allegedly false return is prepared in one judicial district and filed in another, an offense is committed in both, so that a transfer to the more convenient of the two is justified. The holding is highlighted by the dissent, 209 F. 2d at 577, "that the preparation of the false return was not part of the offense."[2]

Where, as here, the only affirmative act alleged in a §145(b) indictment is the filing of a return—and at this juncture we assume for purposes of argument that "signing and tendering" is equivalent to a filing—it cannot be supposed that Congress intended to leave it to the Attorney General or his subordinates to determine whether a taxpayer shall, whenever the two do not coincide, be prosecuted in the district where he hands in his return for transmission or in the district where his return is required to be filed.

It may be that, where specific affirmative acts other than mere filing are charged in a §145(b) indictment, venue may properly be laid elsewhere than in the district where the return under scrutiny was required by law to be filed.

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[2] The earlier district court case to the contrary in the same circuit must now be considered overruled. **United States v. Lefkoff**, 113 F. Supp. 551 (E. D. Tenn.).

Cf. *United States v. Albanese*, 117 F. Supp. 736 (S. D. N. Y.), affirmed 224 F. 2d 879 (C. A. 2), certiorari denied 350 U. S. 845; *United States v. Newton*, 68 F. Supp. 952 (W. D. Va.), affirmed 162 F. 2d 795 (C. A. 4), certiorari denied 333 U. S. 848. But here no affirmative acts other than signing and tendering were charged, acts which we assume *arguendo* under the present heading to be the equivalent of filing. Hence this case should be governed by the rule of the *Warring, Yarborough*, and *Aaron* cases, *supra*, which hold that no offense under §145(b) is committed in the district where the return is placed in transmission for filing in another district.[3]

We do not believe that the Government is helped in this instance by 18 U. S. C. §3732 (*supra*, p. 4), since offenses under §145(b) where only a single act is alleged are not continuing offenses within that provision. *United States v. Aaron*, 117 F. Supp. 962, *supra*. And we do not suppose that the footnote reference to §3732 in the *Parr* case, 351 U. S. at 515, note 5, was intended either as a considered answer to the significant constitutional problems raised by the 1948 revision of that provision, as to which see Hart and Wechsler, *The Federal Courts and the Federal System*, 1104 *et seq.*, or as a directive to the Fourth and District of Columbia Circuits advising those courts that they have been consistently wrong in holding that Washington tax violations may only be indicted and prosecuted in Baltimore.

The basic question presented is whether the Government is to be allowed to evade the Constitutional command as to venue (cf. *United States v. Johnson*, 323 U. S. 273, 276) in order to shop around for what its litigation strategists may

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[3] We note, to show that it has not been overlooked, that the issue of venue was not waived, that issue, it is well settled, is properly raised by a motion for acquittal at the close of the prosecution's case, such as was made here (R. 310a, **et seq.**) **United States v. Jones**, 174 F. 2d 746 (C. A. 7); **United States v. Brothman**, 191 F. 2d 70 (C. A. 2); **United States v. Browne**, 225 F. 2d 751 (C. A. 7). Significantly enough the district judge dealt with petitioner's venue contention on its merits in denying his post-trial motions (R. 2a, 373a, **et seq.**).

from time to time consider as a more favorable forum for convictions in the event of trial and of more exemplary sentences in the event of conviction. Fairly stated, it is whether the Government may assert in Baltimore (*United States v. Warring*, 121 F. Supp. 546, *supra*) and in Parkersburg (*United States v. Aaron*, 117 F. Supp. 952, *supra*) that there is no offense in the place where the return is committed to delivery to the Internal Revenue Service, and then be heard to say in Pittsburgh (in this case) that an offense was committed when the return was tendered at the branch office.

Indeed, if the ruling below stands, a prosecutor is free to fractionalize every §145(b) offense whenever there is a divergence between the boundaries of judicial and internal revenue districts. He may seize on the preparation of the return; on the tendering of the return; on its filing; or on the act of obtaining the blank form, since that was a part of the attempt under the view of the court below—and then seek an indictment based on the portion of the offense that took place in the judicial district where he deems the climate for prosecution to be most favorable.

"We have no sympathy with shopping around for forums," the Fourth Circuit recently had occasion to say in a civil case, *Clayton v. Warlick*, 232 F. 2d 699, 706. The present case, *Parr*, and, above all, that of *Provoo* (*Petition of Provoo*, 17 F. R. D. 183 (D. Md.), appeal dismissed *sub nom. United States v. Provoo*, 350 U. S. 857), suggest that such shopping around, in criminal cases, on the part of prosecutors seeking a more favorable forum for conviction, represents a practice rather than isolated instances. We submit that the gravity of the problem and the apparent frequency with which it seems to be arising, as well as the contrariety of views as to the elements of the offenses denounced by §145(b), call for review by this Court.

Second. We now examine our assumption previously made, that the indictment alleges the equivalent of filing a

false return. We think that it does not, and that the indictment therefore does not allege an offense under Section 145(b).

Each of the three counts of the present indictment (R. 3a-5a) alleges that the petitioner "did willfully and knowingly attempt to evade and defeat" his income tax for the years 1948, 1949, and 1950, "by signing and tendering to an Internal Revenue Service official and Altoona, Pennsylvania" a false and fraudulent income tax return, "which return was filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Pennsylvania." The record shows (R. 10a, 18a, 264a), what is doubtless within the realm of judicial notice, that the Collector for the Collection District in question has his office in Philadelphia, and that Altoona is a branch thereof.

There was no allegation in the indictment that petitioner himself filed or caused the return to be filed with the Collector in Philadelphia.

It is of course familiar law that the offense denounced by §145(b) requires an affirmative act on the part of the defendant, *Spies v. United States*, 317 U. S. 492, nor does petitioner here question other holdings of the court below to the effect that the willful filing of a false return constitutes a sufficient affirmative act within the *Spies* doctrine. *United States v. Croessant*, 178 F. 2d 96 (C. A. 3), certiorari denied 339 U. S. 927; *United States v. Augustine*, 188 F. 2d 359 (C. A. 3), certiorari denied 342 U. S. 815. But this indictment does not allege either that the defendant filed a false return or that he caused a false return to be filed; it states only that he signed and tendered a false return; and the court below did not undertake to sustain the indictment on the basis of filing (Appendix A, *infra*, p. 30).

Mere signing is obviously not a sufficient affirmative act within §145(b), because without signature there would be no return at all; an unsigned return is not a return within the contemplation of the Internal Revenue Code. *Estate of Glenn Stewart*, TC Memo. 1955-107 (April 29, 1955).

That leaves only the allegation of "tendering". Tender alone means only an offer; it does not imply acceptance. That this is not an imaginary difficulty in tax matters is clear from those cases where the Collector would not receive the tendered tax unless the taxpayer supplied incriminating data as well. See *Mungiole v. United States*, pending on petition for writ of certiorari, No. 136, this Term; *United States v. Kahriger*, 210 F. 2d 565, 567, 570, note 5 (C. A. 3). Nor does an unaccepted tender exclude a *locus poenitentiae*. Cf. Hastie, J., in *United States v. Valenti*, 207 F. 2d 242, 246 (C. A. 3).

The trial judge charged the jury (R. 352a) that "Tendering means to offer or hand the Returns to the proper Income Tax Authority at Altoona for forwarding and filing in the Main Office at Philadelphia." If the indictment had thus spelled out the meaning of tender, it might not now be subject to attack as not stating an offense. But the indictment does not so read, nor has "tendering" even been so construed. A tender is essentially synonymous with an offer (6 Williston, *Contracts* (rev. ed.), §1808; *Skillings v. Collins*, 224 Mass. 275, 277, 112 N. E. 938, 939), and hence it contemplates the possibility of action and therefore of refusal by the tenderee (*Greenwood v. Watson*, 171 Fed. 619, 620-621 (C. A. 3); *Kerr v. United States*, 108 F. 2d 585, 586 (App. D. C.)). Consequently mere tender implies a *locus poenitentiae*, as students learn in their first week of law studies (*Payne v. Cave*, 3 T. R. 148).

Tender alone, then, is not such an affirmative act as the *Spies* doctrine contemplates; and in every other case under the criminal provisions of the tax statutes that was held properly brought in a judicial district other than that where the returns were actually required by law to be filed, significant affirmative acts on the part of the defendant were alleged, acts that went far beyond mere signing and tendering. *United States v. Albanese*, 117 F. Supp. 736 (S. D. N. Y.), affirmed 224 F. 879 (C. A. 2), certiorari denied 350 U. S. 845; *United States v. Newton*, 68 F. Supp. 952, 953

(W. D. Va.), affirmed 162 F. 2d 795 (C. A. 4), certiorari denied 333 U. S. 848.[4]

The court below held in substance (Appendix A, *infra*, pp. 29, 30) that "attempt" in Section 145(b) was to be read as an attempt under the common law, and decided that the allegation of tendering was sufficient. But every other case with which we are familiar has read §145(b) differently;[5] the other cases, following *Spies*, hold that some affirmative act is necessary, one that amounts to an attempt to evade in the popular sense, one that goes beyond the concept of the partially completed crime implicit in the technical term "attempt". Cf. *United States v. Quincy*, 6 Pet. 445, 465; *Swift & Company v. United States*, 196 U. S. 375, 402; Holmes, J., dissenting in *Hyde v. United States*, 225 U. S. 347, 387-388.

We submit that *Spies* does not go as far as the court below did, and that accordingly its holding on this point should be reexamined here.

Third. A truly disturbing feature of the present case was the refusal of the court below to recognize that petitioner was prejudicially restricted in his cross-examination of the special agent of the Internal Revenue Service. What is here involved is not a mere question of evidence but a basic rule of fairness.

In the present case, the only evidence that can by any

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[4] In the **Albanese** case, the indictment alleged that the defendants violated §145(b) "by willfully preparing and causing to be prepared and mailed in the Southern District of New York" a false and fraudulent return. This was held to allege an offense in that District.

Similarly, in **Newton**, the allegation was that the defendant at Danville (W. D. Va.) "did wilfully omit and assist in, and procure, counsel and advise the preparation * * * of a false and fraudulent claim * * *" with the Collector at Richmond (E. D. Va.). **Held**, that an offense in the Western District was alleged.

[5] The record shows that the present indictment is the first of its kind (R. 122a).

stretch be thought to impute knowledge of falsity to the defendant came from Agent Yaskin, who testified to certain admissions allegedly made by the petitioner in the course of conversations had with him (R. 281a-282a, 283a, 285a, 286a, 288a, 299a).

It appeared that there were three separate conversations (R. 282a), and that some 460 questions were asked petitioner by the special agent (R. 289a). But when petitioner's counsel sought to elicit other parts of these conversations, objection was made and sustained.

This ruling was basic error. As counsel said (R. 290a), "* * * he has testified, I believe, to what questions he asked Mr. Hoover in his interview. He gave a part of them and I want to ask him about other questions."

What was involved was not, as the trial judge thought, a matter of impeaching the special agent; the obvious issue was adducing the complete text of the three conversations. As Wigmore put it (7 *Evidence* (3d ed. 1940) §2113, p. 523), "the opponent, against whom a part of an utterance has been put in, may, in his turn, complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance." True (*ibid.*, p. 527), "*the remainder thus received merely aids in the construction of the utterance as a whole, and is not in itself testimony.*" but here the ruling of exclusion was unequivocal.

The principle of completeness set forth in Wigmore has been consistently recognized in the federal courts, whether the statement sought to be completed was oral (*United States v. Katz*, 78 F. Supp. 435, 440 (M. D. Pa.), affirmed 173 F. 2d 116 (C. A. 3); *United States v. Corrigan*, 168 F. 2d 641, 645 (C. C. A. 2); *Vause v. United States*, 53 F. 2d 346, 352 (C. C. A. 2)), whether it was a record of prior testimony (*United States v. Cotter*, 60 F. 2d 689, 692 (C. C. A. 2)), or whether the statement was in writing (*Grobelny v. W. T. Cowan*, 151 F. 2d 810, 812 (C. C. A. 2); *Affronti v. United States*, 145 F. 2d 3, 7 (C. C. A. 8); *United States v.*

Weinbren, 121 F. 2d 826, 828-829 (C. C. A. 2); *Harrison v. Rowan*, 3 Wash. C. C. 583, Fed. Case No. 6141, 11 Fed. Cas. at 660 (C. C. D. N. J.)). Significantly, a number of the modern decisions cite Wigmore §2113 in support of the result reached.

The court below refused to decide the applicability of the "partial utterance" rule stating "The court said that it did not know whether the admissions of appellant, to which Yaskin testified on direct examination occurred during an interview. The court was only prohibiting defense counsel from reading questions and answers from the alleged transcript, under the guise of testing Yaskin's recollection, and from asking about appellant's answers during the interview until it was first shown that those answers related to Yaskin's direct testimony" (Appendix A, *infra*, p. 31). But the record is crystal clear that counsel for the petitioner was not attempting to test the special agent's recollection. And it is obvious that the admissions of the petitioner did occur during the interview that the special agent testified *in part* on direct examination. Counsel for petitioner commenced his cross-examination (R. 288a) by asking:

> "Q. Now, in the interview on May 5, 1955, Mr. Hoover attended, is that correct?
>
> A. Yes, sir.
>
> Q. Now, he didn't have a lawyer with him, am I right, at that time?
>
> A. That is correct.
>
> Q. You asked him about 450 questions, is that right, do you remember?
>
> A. I don't remember how many, sir.
>
> Q. Well, actually over 460; do you remember that you asked Mr. Hoover this question, or Johnson, rather, asked it in your presence?
>
> A. I beg your pardon, pardon me?
>
> Q. Johnson, Johnson?
>
> A. What?
>
> Q. Agent Johnson, I am going to read to you the

question. Mr. Hoover was asked this question: 'Q. Mr. Hoover, couldn't you have corrected your book figure?' And he replied, 'A. What do you mean?'

And the next question was, 'Q. Couldn't you have taken out the erroneous entries from the book?' Do you remember how he answered that question?

Well, I will save time. I will read you your answer.

A. My answer, sir?

Q. I will read you Mr. Hoover's answer.

The answer he made, he answered as follows; I am reading from the transcript of the testimony, so that the Assistant District Attorney can follow ——

MR. PALETTA: I don't understand your reading the answer. I don't understand what you are asking this witness about. You are reading the answer, has he denied the answer?

THE COURT: I don't think you should talk to Counsel. If you have any objections, make them to the Court.

MR. PALETTA: Well, Your Honor, I object to this line of questioning. I don't quite understand what Counsel intends to bring out.

THE COURT: Objection sustained.

BY MR. KOSSMAN:

Q. Do you remember Mr. Hoover was asked this question: 'Q. Couldn't you have taken out the erroneous entries from the book?' And do you remember ——

THE COURT: He has objected to that and the objection is sustained.

MR. KOSSMAN: To the question?

THE COURT: Yes.

MR. KOSSMAN: Oh.

Q. You asked Mr. Hoover various questions, am I correct, during that interview?

A. Oh, yes, sir.

Q. Various questions?

A. Yes, sir.

Q. Now, do you remember that you yourself asked Mr. Hoover this question ——

THE COURT: His objection has been sustained.

MR. KOSSMAN: To all questions?

THE COURT: From that record there. We don't know what it is. It isn't in evidence, there was nothing given in the direct testimony that I heard that you want to impeach this witness on. Statements made out of Court are extrajudicial statements. You have to impeach this witness ——

MR. KOSSMAN: If the Court please, he has testified, I believe, to what questions he asked Mr. Hoover in his interview. He gave a part of them and I want to ask him about other questions."

Just because counsel for the petitioner to "save time" stated that he would read one answer to 460 questions, this should not be seized upon by the court below as denying petitioner the right to have the special agent cross-examined fully about the other questions petitioner was asked and his answers. There was certainly no necessity for formally identifying the transcript. That was only the means for counsel for the petitioner to secure the exact questions asked and the exact answers. But even if no transcript were available after the special agent had testified on direct examination as to part of the interview, he could have been asked about the remainder. And most assuredly counsel for petitioner was not required as both courts below thought he should, "make any effort to use the transcript in his case-in-chief." The special agent was an important witness. On the present record, therefore, it cannot be contended that the error was harmless.

Fourth. Petitioner's requested instruction No. 7 was (R. 371a-372a):

"7. The crime charged in this indictment is a willful attempt to evade taxes. Therefore, the jury must find

the defendant not guilty of the offense charged in the indictment, even if they believe that he delivered a false income tax return with the intent to defeat assessment of tax to the Collector."

When the trial judge came to this request, he said (R. 337a, 338a), "I am not sure what it means, what is meant by No. 7, but I would deny No. 7, unless you can explain it to me. * * * Now, what do you mean by intent to defeat an assessment of taxes to the Collector; I am not certain." And counsel then proceeded to explain, as follows (R. 338a):

"MR. KOSSMAN: Well, if the Court please, that is a misdemeanor, to deliver a false Income Tax Return, and there is the felony charge to willfully attempt to evade taxes, what is charged in this Indictment, a willful attempt to evade taxes.

THE COURT: To evade and defeat taxes.

MR. KOSSMAN: A willful attempt to evade and defeat taxes, but merely delivering a false Income Tax Return with an intent to defeat the tax is a misdemeanor and is a different charge than a willful attempt, even though there might be sufficient evidence to support a charge of filing and delivering a false Income Tax Return, that is not sufficient to make it a willful attempt to evade taxes. That was the reason I put that in.

There is another thought and it is, under the Federal Rules of Criminal Procedure, I think it is Rule 31-C, a jury can find the Defendant guilty of a lesser offense than the one charged but due to the fact that the Statute of Limitations has run on the lesser charges they couldn't find him guilty of a lesser charge, it would be either 145-A or Section 3616.

THE COURT: Well, it will be denied."

Thus there was clearly raised the question whether the misdemeanor denounced by old 26 U. S. C. §3616(a), of de-

livering to the Collector a false or fraudulent return with intent to evade the assessment intended to be made, is a lesser included offense within the felony set forth in old 26 U. S. C. §145(b), of attempting to defeat or evade the tax in any manner. If it was and the jury under Federal Rule 31(c) found that the defendant was guilty only of the lesser included offense, then that latter offense would be barred by the three year statute of limitations.

In *Berra v. United States*, 351 U. S. 131, this Court decided that if the method of evasion charged in the indictment was the filing of a false return that §§145(b) and 3616(a) cover precisely the same ground, and therefore, petitioner there was not entitled to an instruction of the lesser crime under Rule 31(c) of the Federal Rules of Criminal Procedure.

Here, the court below held that "defendant was not indicted for or convicted of filing a false return. He was indicted for affirmative action, other than filing, namely signing and tendering a false return" (Appendix A, p. 34). This was obviously not the "identical question" in the *Berra* case, as the court below believed. It therefore follows that petitioner was entitled to the requested instruction.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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